Boo Kok Ngeak & Anor v Lim Kian Hoe & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S22–497 OF 1997
KAMALANATHAN RATNAM J
7 AUGUST 1998

Contract *— Rescission — Collateral and illegal purpose — Termination of contract in order to demand additional purchase price — Allegation of breach of contract — Whether agreement was still in force*

Contract *— Breach — Sale of property — Unauthorized renovation — Renovation ameliorated condition of property — Whether renovation by purchaser amounted to taking of vacant possession — Whether breach of contract entitling vendor to terminate contract*

The defendants — the owners of a property — entered into a sale and purchase agreement ('the agreement') to sell the property to the plaintiffs. The plaintiffs paid RM31,000 as deposit for the purchase. It was a term of the agreement that the date of completion was to be three months from the date when the certificate of fitness was received by the plaintiffs and the defendants were to produce the redemption statement within 14 days from the date of service on them of the certificate of fitness. In anticipation of the completion of the agreement, the plaintiffs began to renovate the property. The defendants terminated the agreement on the ground that the plaintiffs had renovated the property without their consent. Notwithstanding the same, the plaintiffs forwarded the redemption sum to the defendants and confirmed that they had restored the property to its original position. The defendants refused acceptance and forfeited the plaintiffs' deposit. The plaintiffs applied for summary judgment for a declaration that the agreement was valid and enforceable and for specific performance of the agreement. The plaintiffs contended that after the termination of the agreement, the defendants attempted to re-negotiate the sale at an increased price of RM100,000 which was subsequently reduced to RM31,000. The plaintiffs claimed that this was clear 'blackmail'.

Held, allowing the plaintiffs' application:

(1) Whilst the court was not prepared to accept the term 'blackmail', the court could not but conclude that the only reason the defendants terminated the agreement was with the intention of demanding a further sum of RM100,000 which was subsequently reduced to RM31,000. The termination of the agreement was done for a collateral and illegal purpose of demanding an additional sum. On this ground alone, the plaintiffs were entitled to a declaration that the agreement was not terminated but was in force (see p 736D–E).

(2) The defendants did not procure the redemption statement within 14 days from the date of service on them of the certificate of

fitness. Pursuant to cl 17.1 of the agreement, the completion date therefore ceased to run. They who seek equity must themselves do equity. The defendants rescinded the agreement, yet they failed to consider the fact that had they obtained the redemption statement earlier, ie when the plaintiffs first sought the redemption statement, the plaintiffs might have been able to pay the redemption sum much earlier and would have been able to comply with the defendants' requirement as to be able to obtain vacant possession upon payment of the redemption sum. The defendants' delay in obtaining the redemption statement caused delay in the payment of the redemption sum. The maxim delay defeats equity must apply. The defendants therefore were not entitled to rescind the agreement (see pp 736I and 737A–B).

(3) On the defendants' submission that the plaintiffs had covenanted that they would not take vacant possession before full payment of the balance purchase price, the court took the covenant to mean that it was the vendors who had covenanted to deliver vacant possession upon full payment of the balance purchase price. In any case, the plaintiffs did not take vacant possession of the property. The term 'vacant possession' connotes the handing over of lawful and complete possession of a property to another, in a vacant condition and thus capable of occupation and free from any claim of right of possession either by the vendor or any other party. In this case, all that the plaintiffs did was to renovate the front gate. This act in fact ameliorated the condition of the property. Merely by doing up the gate, the plaintiffs could not be held to have obtained vacant possession. In any case, the defendants denied 'giving' vacant possession (see p 738E–H).

(4) Specific performance was the correct remedy for the plaintiffs in this case. They had in fact expended money in doing up the frontage and demolishing it. The damages the plaintiffs ought to be entitled to should be limited to the actual cost of demolishing the renovations to the frontage and the present cost of re-doing the frontage as it was done, prior to its demolition (see p 739C).

[Bahasa Malaysia summary

Defendan-defendan — pemilik sebuah hartanah — telah mengikat satu perjanjian jual beli ('perjanjian tersebut') untuk menjual hartanah tersebut kepada plaintif-plaintif. Plaintif-plaintif telah membayar RM31,000 sebagai deposit bagi pembelian tersebut. Ia merupakan satu terma perjanjian tersebut bahawa tarikh penyiapan hendaklah tiga bulan daripada tarikh bilamana sijil layak menduduki diterima oleh plaintif-plaintif dan defendan-defendan hendaklah mengemukkan penyata penebusan dalam tempoh 14 hari dari tarikh penyampaian ke atas mereka akan sijil layak menduduki itu. Dalam menjangkakan penyempurnaan perjanjian tersebut, plaintif-plaintif telah mula mengubahsuai hartanah tersebut. Defendan-defendan telah

menamatkan perjanjian tersebut atas alasan bahawa plaintif-plaintif telah mengubahsuai hartanah tersebut tanpa persetujuan mereka. Tanpa menghiraukan perkara yang sama, plaintif-plaintif telah mengemukakan jumlah penebusan kepada defendan-defendan dan mengesahkan bahawa mereka telah memulihkan semula hartanah tersebut kepada keadaan asalnya. Defendan-defendan telah enggan menerima dan merampas deposit plaintif-plaintif. Plaintif-plaintif telah memohon untuk penghakiman terus bagi satu pengisytiharan bahawa perjanjian tersebut adalah sah dan boleh dikuatkuasakan serta untuk perlaksanaan spesifik akan perjanjian tersebut. Plaintif-plaintif menegaskan bahawa selepas penamatan perjanjian tersebut, defendan-defendan cuba untuk merundingkan semula penjualan tersebut pada harga yang dipertingkatkan sebanyak RM100,000 yang mana kemudiannya telah dikurangkan kepada RM31,000. Plaintif-plaintif menuntut bahawa ini jelas merupakan suatu 'peras ugut'.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Sementara mahkamah tidak bersedia untuk menerima terma 'peras ugut', mahkamah tidak boleh tetapi memutuskan bahawa satu-satunya alasan defendan-defendan telah menamatkan perjanjian tersebut adalah dengan niat untuk menuntut jumlah selanjutnya sebanyak RM100,000 yang telah kemudiannya dikurangkan kepada RM31,000. Penamatan perjanjian tersebut telah dilakukan untuk satu kolateral dan tujuan menuntut satu jumlah tambahan yang tidak sah di sisi undang-undang. Atas alasan ini sahaja, plaintif-plaintif adalah berhak kepada satu pengisytiharan bahawa perjanjian tersebut telah tidak ditamatkan tetapi adalah berkuatkuasa (lihat ms 736D–E).

(2) Defendan-defendan tidak memperolehi penyata penebusan dalam tempoh 14 hari daripada tarikh penyampaian ke atas mereka akan sijil layak menduduki itu. Selaras dengan fasal 17.1 perjanjian tersebut, tarikh penyiapan dengan itu telah dihentikan. Mereka yang cuba mendapatkan ekuiti seharusnya sendiri melakukan ekuiti. Defendan-defendan telah membatalkan perjanjian tersebut, tetapi mereka gagal untuk menimbangkan fakta bahawa sekiranya mereka telah memperolehi penyata penebusan tersebut lebih awal lagi, iaitu ketika plaintif-plaintif pertama kalinya cuba untuk mendapatkan penyata penebusan tersebut, plaintif-plaintif mungkin telah dapat membayar jumlah penebusan tersebut lebih awal lagi dan mungkin akan dapat mematuhi kehendak-kehendak defendan-defendan supaya dapat memperolehi milikan kosong setelah pembayaran akan jumlah penebusan tersebut. Kelewatan defendan-defendan memperolehi penyata penebusan tersebut telah menyebabkan kelewatan dalam pembayaran jumlah penebusan tersebut. Pepatah kelewatan mengagalkan ekuiti semestinya terpakai. Defendan-defendan dengan itu tidak berhak untuk menamatkan perjanjian tersebut (lihat ms 736I dan 737A–B).

(3) Atas penghujahan defendan-defendan bahawa plaintif telah berwaad bahawa mereka tidak akan mengambil milikan kosong sebelum pembayaran penuh akan baki harga belian, mahkamah telah membuat kesimpulan bahawa waad tersebut bermakna bahawa penjual-penjual yang telah sebenarnya berwaad untuk menyerahkan milikan kosong setelah pembayaran sepenuhnya akan baki harga belian. Walau bagaimanapun, plaintif-plaintif tidak mengambil milikan kosong akan hartanah tersebut. Ungkapan 'milikan kosong' menunjukkan penyerahan secara sah dan pemilikan yang sempurna akan sebuah hartanah kepada satu pihak yang lain, dalam keadaan yang kosong dan dengan itu boleh diduduki dan bebas daripada sebarang hak pemilikan sama ada oleh penjual atau mana-mana pihak yang lain. Dalam kes ini, apa yang dilakukan oleh plaintif adalah hanya mengubah suai pintu pagar hadapan. Perbuatan ini telah pada hakikatnya menjadikan keadaan hartanah tersebut lebih baik. Hanya dengan memperbaiki pintu pagar tersebut, plaintif-plaintif tidak boleh dianggapkan sebagai telah memperolehi milikan kosong. Walau bagaimanapun, defendan-defendan telah menafikan 'memberikan' milikan kosong (lihat ms 738E–H).

(4) Pelaksanaan spesifik merupakan remedi yang wajar untuk plaintif-plaintif dalam kes ini. Mereka telah pada hakikatnya membelanjakan wang dalam membaik pulih bahagian hadapan hartanah tersebut dan merobohkannya. Ganti rugi yang plaintif-plaintif seharusnya berhak kepada haruslah dihadkan kepada kos sebenar merobohkan pengubahsuaian kepada bahagian hadapan hartanah tersebut dan kos semasa memulihkannya semula sepertimana yang dilakukan, sebelum ia dirobohkan (lihat ms 739C).]

Notes

For a case on breach of a sale of property contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1670.

For cases on rescission, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2743–2779.

Legislation referred to

Rules of the High Court 1980 O 81, r 2(1)
Specific Relief Act 1950 s 11(1)(c), (2)

FH Woon (*Prasad Abraham & Associates*) for the plaintiff.
TF Liow (*SL Ong* with him) (*Liow Tiek Foong & Partners*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The defendants are owners of property known as HS (M) 8764, PT No 30070 in the Mukim of Petaling with a double-storey terrace house on it known as No 54 Jalan 8/149J, Bandar Baru Sri Petaling, 57000 Kuala Lumpur ('the property'). The plaintiffs and defendants entered into a sale and purchase agreement dated 19 December 1996 whereby the defendants agreed to sell and the plaintiffs agreed to purchase the property at RM310,000. The plaintiffs paid RM31,000 as deposit for the said purchase and which said sum is acknowledged by the defendants in the said agreement.

It was, inter alia, a term of the said agreement that the date of completion was to be three months from the date when the certificate of fitness issued by the Dewan Bandaraya Kuala Lumpur ('DBKL') was received by the plaintiffs' solicitors. It was also agreed that there was to be an extended completion date of one month. The certificate of fitness issued by DBKL on 25 June 1997 was received by the plaintiffs' solicitors on 7 July 1997.

Since the certificate of fitness was served on their solicitors on 7 July 1997, the plaintiffs took the completion date to be 6 October 1997 and with the extended one month, the plaintiffs believed that the final date for completion was 6 November 1997. The plaintiffs applied for a loan from Hong Leong Bank being 80% of the purchase price. By way of their solicitors' letter dated 3 October 1997, the plaintiffs forwarded to the defendants' solicitors the balance of RM31,000 being the difference between the balance of the purchase price and the loan sum. In anticipation of the completion of the agreement, the plaintiffs began to renovate the said house. The defendants' solicitors wrote to the plaintiffs' solicitors on 13 October 1997, terminating the agreement because the plaintiffs had renovated the frontage of the property without the defendants' consent. Notwithstanding the same, the plaintiffs' solicitors by their letter dated 17 October 1997 forwarded the redemption sum to the defendants' solicitors and confirmed that they had restored the frontage of the said property to its original position. The defendants refused acceptance and forfeited the plaintiffs' deposit of RM31,000. The defendants also informed the plaintiffs not to pay the redemption sum to the defendants' financiers because the agreement had been terminated.

Case for the plaintiff

The plaintiffs contend that soon after the termination of the agreement the broker who arranged the deal attempted to mediate. The defendants asked for an additional RM100,000 and finally reduced the sum to RM31,000. The plaintiffs contend that this was clear 'blackmail'. Having filed a writ, the plaintiffs then applied for summary judgment pursuant to O 81 of the Rules of the High Court 1980 ('the RHC') for a declaration that the

agreement dated 19 December 1996 was valid and enforceable and for specific performance of the said agreement and for damages and costs. Alternatively, the plaintiffs prayed for a declaration that based on the termination of the said agreement the parties be relieved of their obligations under the said agreement and for a further order that the deposit sum of RM31,000 be returned to them with 10% interest from the date of issuance of the writ and special damages amounting to RM12,200. A B

Finally, the plaintiffs stated that whilst having exhibited photographs showing the renovation in progress, the defendants had failed to inform the court that the plaintiffs had in fact put back the house almost to its original state. C

Case for the defence

The defendants contend that the plaintiffs having wilfully breached the terms of the sale and purchase agreement, the defendants were therefore entitled to terminate the said agreement and that since the terms of the agreement provided for forfeiture of the deposit for breach of the agreement, they were justified in forfeiting the deposit sum of RM31,000. The defendants stated that on 10 July 1997 the plaintiffs' solicitors wrote to them enquiring if it was possible for the plaintiffs to take vacant possession of the property notwithstanding the fact that the full purchase price had not been paid. The defendants' solicitors replied by way of a letter dated 15 July 1997 that the defendants had no objections provided the redemption sum was effected. However, on 13 October 1997 the defendants discovered that the plaintiffs had begun the renovations. It was then that on the same day the defendants' solicitors wrote the letter of termination. D E

Findings of the court F

Preliminary objection by the defendants

The defendants raised a preliminary issue, stating that there was non-compliance with the requirement of O 81 r 2(1) of the RHC which reads: G

> An application under rule 1 must be made by summons supported by an affidavit made by some person who can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action.

The defendants contended that the plaintiffs had failed in their affidavits to swear positively to the facts verifying the cause of action and stating that in their belief there was no defence to the action. This is a totally wrong submission to make. H

In encl 11, the first plaintiff affirmed an affidavit both on his behalf and on behalf of the second plaintiff and averred in para 16 as follows: I

> Saya bersumpah secara positif akan fakta-fakta yang menentusahkan kausa tindakan ini yang dideposkan di sini dan mengikut kepercayaan saya, defendan tidak ada pembelaan dalam tindakan ini.

The preliminary objection must be dismissed in limine.

A The renovations

Although the redemption sum had yet to be settled, the plaintiffs' solicitors wrote to the defendants' solicitors a letter dated 10 July 1997. The said letter reads as follows:

B Your Ref: CONV/5367/96/AW-C LETTER

Our Ref: 3 BKN 3957/96/W/HLB

Date: 10 July 1997

M/S Liow Teik Foong & Partners
Advocates & Solicitors
C Room 209, 2nd Floor
Wisma Westcourt
126, Jalan Klang Lama
58000 Kuala Lumpur By Fax No 7823659/Post

Dear Sir

D Sale and Purchase of Property

Property	:	HS(M) 8764, PT No 30070 Mukim Petaling
Vendor(s)	:	Lim Kian Hoe and Lee Yuat Ngan
Purchaser(s)	:	Boo Kok Ngeak and Cheah Poh Lean (f)

E We refer to the above matter.

Kindly let us have the redemption statement which was requested by us vide our letter dated 29 April 1997. Kindly be reminded that the redemption statement is to be addressed to M/s Hong Leong Bank Bhd.

In the interim, we have been instructed by our client to request for
F vacant possession of the property to enable our client to carry out renovation works, if any, instead of leaving the property vacant. Perhaps the vacant possession would be exchanged with the payment of the differential sum amounting to RM31,000.

Your early reply is much appreciated.

G Thank you.

Yours faithfully,

(Sgd)

ft/SL

H cc: client Mr Boo Kok Ngeak and others
No 14, Jalan 5/149D
Bandar Baru Sri Petaling
57000 Kuala Lumpur

The defendants' solicitors' response is by letter dated 15 July 1997. The
I same is also reproduced and it reads as follows:

Your Ref: 3 BKN 3957/96/w/lsl/HLBB

Our Ref: CONV/5367/96/AW-C LETTER

15 July 1997

M/s SL Tan & Associates
Advocates & Solicitors
No 57, Jalan Ambong Dua (Jalan 4)
Kepong Baru
52100 Kuala Lumpur By Fax: 6211481/HAND

Dear Sir

Property	:	HS (M) 8764, PT No 30070 Mukim Petaling
Vendor(s)	:	Lim Kian Hoe and Lee Yan Ngan
Purchaser(s)	:	Boo Kok Ngeak and Cheah Poh Lean (f)
Loan facility	:	RM248,000

We spoke to our client just now at 4.55pm and our client is agreeable to the release of the keys to your client on condition that the redemption is effected. Furthermore, if the case is aborted for any reason whatsoever then the renovation shall not be claimable by your client against our client.

Please take note of the aforesaid. We look forward to a speedy redemption once we have forwarded the said redemption statement to you.

Yours faithfully

(Sgd)
(William Liow)

cc

Mr Lim Kian Hoe & By Fax: 7834428
Mdm Lee Yuat Ngan
No 1, Jalan Lazat Enam
Taman Bandaraya
58200 Kuala Lumpur

It is obvious that as early as 29 April 1997 the plaintiffs had requested for the redemption statement and that the letter dated 10 July 1997 was a reminder for the same, coupled with a request for permission to carry out renovation works. By their response dated 15 July 1997, the defendants had agreed that the redemption sum was to be forwarded only when the redemption statement was sent to the plaintiffs.

There is no evidence before me when the redemption statement was actually sent but the balance purchase price was paid on 17 October 1997.

From the evidence, I find that since the defendants had delayed in forwarding the redemption statement the plaintiffs who were merely renovating the outside of the premises were in fact ameliorating the said property and enhancing its value rather than causing it damage. It is obvious that the plaintiffs were anxious and eager to renovate the property. However, as soon as the defendants raised objections the plaintiffs were prepared to demolish the renovations and restore the house to its original condition. Towards this end, the plaintiffs' solicitors wrote a letter dated 16 October 1997 which is reproduced and which reads as follows:

Your Ref: CONV/5367/96/AW C LETTER
Our Ref: 3 BKN 3957/96/W/LSL/HLBB

Date: 16 October 1997

M/s Liow Teik Foong & Partners
Advocates & Solicitors
Room 209, 2nd Floor
Wisma Westcourt
126, Jalan Klang Lama
58000 Kuala Lumpur By Fax No 7823659/Post

Dear Sir,

Sale and Purchase of Property
Property : No 54, Jalan 8/149J, Bandar Baru Sri Petaling, 57000 Kuala Lumpur
Vendor(s) : Lim Kian Hoe and Lee Yuat Ngan (f)
Purchaser(s) : Boo Kok Ngeak and Cheah Poh Lean

We refer to your letter dated 14 October 1997.

We reiterate that our clients did not breach any term of the SPA.

Our clients merely enhanced the value of the property under the circumstances as stated in our letter to you dated 14 October 1997.

However, our clients are willing to demolish the new gate and restore the property to its original state immediately.

Kindly let us know if your client agree to the same. We humbly suggest that the new gate be remain subject to the condition that if the SPA is terminated due to our client's fault, our client shall not be entitled to remove the same.

Your immediate reply is much appreciated.

Thank you.

Yours faithfully,

(Sgd)
c/SL
cc client: Attn Mr Frank Mo Fax No 9438750

Obviously, the plaintiffs were willing to accept full responsibility and yet the defendants did not reply this letter. The defendants alleged that greater damage was done and other renovations were completed, but these allegations were specifically denied by the plaintiffs by their solicitors' letter dated 14 November 1997.

Whilst I agree that the renovations done were without the consent of the defendants, such renovations as were done would have caused an enhancement towards the value of the property. However, since the defendants never responded to their letter of 16 October 1997, the plaintiffs expended further money and time to put the property back to its original condition as best as they could. All these acts were clearly indicative of conduct showing a willingness to conclude the sale.

The alleged 'blackmail'

The plaintiffs argued that whilst the defendants had terminated the said agreement and had forfeited their deposit the defendants were yet willing

to re-negotiate the sale at an increased price of RM100,000 which was subsequently reduced to RM31,000. This the plaintiffs contended was tantamount to blackmailing them. A

The defendants vehemently denied any allegation of blackmail but admitted that the broker who arranged for the sale had approached them to negotiate and that the defendants had indeed asked for a further sum of RM100,000 but that this sum was intended to defray the cost of additional legal fees for a fresh agreement, additional brokerage fees, additional interest for holding the property for a longer period of time, additional charges incurred to maintain the property and additional charges for re-doing the damage caused by the plaintiffs. These items were enumerated in the defendants' solicitors' letter dated 7 November 1997 and addressed to the plaintiffs' solicitors. B C

The defendants had given no breakdown as to how the said items necessitating the additional charges could amount to RM100,000. Even so, no explanation was given by the defendants why there was a sudden drop in their claim from RM100,000 to RM31,000. Whilst I am not prepared to accept the term 'blackmail' I cannot but conclude that the only reason the defendants terminated the agreement was with the intention of demanding a further sum of RM100,000 which was subsequently reduced to RM31,000. The termination of the agreement was done for a collateral and illegal purpose of demanding an additional sum. On this ground alone, the plaintiffs are entitled to a declaration that the agreement is not terminated but is in force. D E

The requirement of the redemption statement

The sale and purchase agreement specifically provides pursuant to cl 17.1 for the procurement of a redemption statement by the defendants. The said clause reads: F

> The vendor covenants and agrees that the vendor shall at the vendor's own costs and expense procure and obtain from the chargee a redemption statement in respect of the said property stating the total amount of monies due and owing to the chargee by the vendor together with all the requisite undertakings which may be required by the purchaser's financier, if any, to release the amount of monies as stated in the redemption statement. The vendor further agrees to obtain such redemption statement and requisite undertakings from the chargee within fourteen (14) days from the date the certificate of fitness has been issued and handed to the purchaser's solicitors FAILING WHICH the completion date shall cease to run and shall be automatically extended until the original redemption statement together with all the original requisite undertakings are delivered to the purchaser's solicitors. G H

Here the defendants did not procure the redemption statement within the 14 days from the date of service on them of the certificate of fitness which was on 7 July 1997. The completion date therefore ceased to run. They who seek equity must themselves do equity. The defendants rescinded the agreement; yet they failed to consider the fact that had they obtained the redemption statement as early as on 29 April 1997 when the plaintiffs first I

A sought the redemption statement, the plaintiffs might have been able to pay the redemption sum much earlier and would have been able to comply with the defendants' requirement as to be able to obtain vacant possession upon payment of the redemption sum. The defendants' delay in obtaining the redemption statement caused the delay in the payment of the redemption sum. Surely the maxim delay defeats equity must apply. The defendants therefore are not entitled to rescind the agreement. It is obvious that the redemption statement is important. The vendors could have been paying the loan instalments or may even have defaulted. It is incumbent upon the purchasers to know the exact sum outstanding. They also need to know the vendors' bank and the account number, so that the cheque for the redemption sum could be issued in the vendors' financiers' name.

The without prejudice letter

The defendants took umbrage at the production of their 'without prejudice' letter dated 26 November 1997. The said letter is reproduced and it reads:

Your Ref: PAA 9260/97/WFH

Our Ref: CONV/5367/96

Date: 26 November 1997

Prasad Abraham & Associates
Advocates & Solicitors
No 02-02 Second Floor, Bangunan Ming
Jalan Bukit Nenas
50250 Kuala Lumpur

Without Prejudice
Fax: 2308444

Dear Sir,

Re: Property : No 54, Jalan 8/149J, Bandar Baru Sri Petaling, 57000 Kuala Lumpur
Vendor(s) : Lim Kian Hoe and Lee Yuat Ngan (f)
Purchaser(s) : Boo Kok Ngeak and Cheah Poh Lean (f)

We refer to your letter dated 14 November 1997 and our reply to you subsequently on 19 November 1997. Our client is prepared to let your client have the premises if the sum of RM31,000 is paid to our client or on the other hand another option would be to refund to your client the sum of RM31,000 and the matter called off.

Telephone conversation last week confirms. We look forward to your response.

Yours faithfully,

(Sgd)
cc
Mr and Mrs KH Lim Fax: 7834428
Mr K Chandra Fax: 2303658

The defendants, however, cited no authority nor explained why the said letter ought not to have been tendered.

Having read the letter, I find that the plaintiffs are entitled to disclose the said letter because I have already held that the demand for the additional payment of whether RM100,000 or RM31,000 is illegal. The defendants cannot shroud an illegality by concealing it with a 'without prejudice' mantle. An illegality must be exposed.

Vacant possession

The defendants rely on cl 10.2 of the said agreement to claim that the plaintiffs had covenanted that they would not take vacant possession before the full payment of the balance purchase price. Clause 10.2 reads:

> Upon full payment of the balance purchase price in accordance with cl 2 hereof together with interest under cl 3 hereof, if any, the purchaser shall forthwith be entitled to and the vendor shall deliver vacant possession of the said property. In the event that the vendor fails to deliver vacant possession of the said property to the purchaser, the vendor shall be liable to pay liquidated damages at the interest rate as stated under s 8 of Schedule B herein on the purchase price from the date of full payment of the balance purchase price until the delivery of vacant possession by the vendor to the purchaser.

I take this covenant to mean that it is the vendors who have covenanted to deliver vacant possession upon full payment of the balance purchase price. It is a covenant by the vendors to give vacant possession and not a covenant by the plaintiffs that they will not take vacant possession.

In any case, the plaintiffs did not take vacant possession of the property. In *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446, the court defined vacant possession as a term applied to premises sold or offered for sale and not subject to a lease, where the vendor must give vacant possession on completion, subject to an agreement to the contrary. The court also held that vacant possession meant more than being empty and unoccupied. The property conveyed must be capable of occupation by a purchaser. It is my judgment that the term 'vacant possession' connotes the handing over of lawful and complete possession of a said property to another in a vacant condition and thus capable of occupation and free from any claim of right of possession either by the vendor or any other party. In this case, all that the plaintiffs did was to renovate the front gate. As I had found, this act in fact ameliorated the condition of the property. The plaintiffs had denied all other allegations of renovation or damages. Merely by doing up the gate, the plaintiffs cannot be held to have obtained vacant possession. In any case, the defendants deny 'giving' vacant possession. All that the plaintiffs had done is that they may have trespassed. But that is not the defendants' case.

Section 11(1)(c) of the Specific Relief Act 1950 reads:

> Cases in which specific performance enforceable
>
> (1) Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced —
>
> ...

A (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

Section 11(2) reads:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately
B relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

It is my judgment that specific performance is the correct remedy for the plaintiffs in this case. They have in fact expended money in doing up the frontage and demolishing it. I also hold that the damages the plaintiffs
C ought to be entitled to should be limited to the actual cost of demolishing the renovations to the frontage and the present cost of re-doing the frontage as it was done, prior to its demolition. The plaintiffs will have their costs.

Order accordingly.

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Reported by Jafisah Jaafar

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